How To Try A Land Damage Case

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BY

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The author of this Lecture has been a member of the Massachusetts Bar for nearly twenty years. In this long period of practice, principally devoted to Constitutional Law matters, he has acquired a fund of practical knowledge on some of the most intricate problems of the law, which will appeal with unusual force to those interested in Eminent Domain, Taxation and Land Damage cases.

Mr. Nichols was born in Boston, July 25, 1875. He received his preliminary education in private schools in Boston, and later entered Harvard College, from which he received the degree of Bachelor of Arts in 1895. He then entered Harvard Law School, from which he received the degree of Bachelor of Laws in 1898, and was admitted to the Massachusetts Bar the same year.

From 1898 until 1909 he was in the Law Department of the City of Boston, first as Assistant City Solicitor, and later as Assistant Corporation Counsel. During this period he handled many important cases involving Constitutional points, which has made him an acknowledged expert in that branch of law.

In 1909 Mr. Nichols entered private practice, and in 1910 entered into a partnership with S. H. Hudson, Esq., of the Boston Bar, and has since continued with this firm, which is known as "Hudson and Nichols."

Mr. Nichols is the author of "The Law of Land Damages in Massachusetts," which was published in 1907; "The Power of Eminent Domain," published in 1909; "Taxation in Massachusetts," published in 1913; and the articles on "Taxation" and "Eminent Domain" in Modern American Law.

The reader will find a great deal of valuable practical information on the following pages.

HOW TO TRY A LAND DAMAGE CASE

By

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The term "land damage case" is generally understood as signifying a case involving the ascertainment of compensation, either for the taking of land for public use by eminent domain, or for permanent injury to land by the construction of a public improvement. It is thus given a rather different meaning than its literal significance, in that it includes the appraisal of value of land when the whole of it is taken and no question of damage to remaining land is involved, and that it excludes cases involving damage to land by the mere trespass of a private party. Land damage cases belong to a class by themselves, whether any land is taken or not, and they presuppose a permanent condition of things created by sanction of law for the public good, and have nothing in common with a suit for a trespass to land which will not be repeated, or for a nuisance which the law will cause to be abated.

The procedure in land damage cases varies widely in the different States, depending as it does entirely upon statutory law, and there are two entirely dif-

ferent methods of taking property by eminent domain, each of which involves an entirely different treatment of the subject from the other. In many of the States, when a new highway or street is to be laid out, a board of county commissioners, or street commissioners, or aldermen, or selectmen or a similar local body, by vote or resolution establishes the desired highway and makes a taking of the land required, and upon the entry of this vote or resolution upon the official records of the board which passed it, or of the registry of deeds in the county in which the land is situated, as the local statutes may require, the taking is complete, and the tile to the land taken, or to a right of way over such land, passes from the owner to the county, city or town. The board which makes the taking generally has also the duty of awarding compensation to the owners of the land, and such an award is made at the same time that the land is taken. Notice of the taking, by publication or service, is then given to the owners of the land, and it devolves upon them, if dissatisfied with the award, to prosecute their claim for additional compensation. This is done by bringing a special proceeding provided by statute, either in the nature of an appeal from the original award or an original suit, in which the owner of the land appears in the capacity of petitioner or plaintiff, and the county, city or town is brought into court as a respondent or defendant. In some, though not all, of the States which employ this method of taking land for highways and other governmental and municipal purposes, a similar provision is made for takings by

railroad or other public service corporations, although in such cases the approval by the public authorities of the route selected by the company is generally required.

In the majority of the States, when a corporation, and in many States, a county, city or town, desires to take land by eminent domain, it files a petition in court asking to be allowed to condemn certain property described in the petition, and the owners of the property are made respondents or defendants. If the court finds that the party seeking to condemn the land has the requisite authority from the legislature, and that the proceedings are regular, it enters an order accordingly, and the damages are then duly assessed by the jury or other tribunal provided by law.

It has happened with surprising frequency, in many of the States, that corporations have undertaken public improvements inflicting serious damage upon private land, or have even actually taken land, without adequate authority from the legislature. A corporation attempting to exercise eminent domain without authority is a mere trespasser, and the owners of lands affected are entitled to treat it as such. In such cases, however, as a practical matter, it often would result in such public discomfort and economic loss if the offending structure were torn down, and such inconvenience to all parties if the owner, in order to recover compensation, was obliged to bring successive actions of trespass for damages suffered up to the date of the writ in each case, that, if the structure is one which the legislature has or

might have authorized, the courts are inclined to allow permanent damages to be assessed in one action, just as in a statutory eminent domain proceeding, and to treat the payment of the damages as equivalent to an authority to continue to maintain the structure as long as the public needs require it. In such a case, of course the owner of the land is the plaintiff and the corporation is the defendant; and the same damages are assessed as in a true eminent domain case.

In some States trial by jury in land damage cases is required by the constitution, in others there is no such requirement. In every State, however, the owner is entitled to be heard upon the amount of his compensation and damages by an impartial tribunal, and to an opportunity to offer evidence upon this issue, to have the evidence against him submitted in open court, with the right to subject it to cross-examination, and to present an argument upon the law and the evidence, and to take all questions of law arising at the hearing to the highest appellate tribunal provided by law for questions of similar importance. When the case is ripe for such a hearing, all questions involving the validity of the taking have been passed upon, if the proceedings were instituted by the condemning party, or waived if the petition for compensation was brought by the owner, and the only matter before the court is to determine the compensation or damages to be awarded the land-owner, for the taking of his land, or for injury to land not taken. It is the trial of this issue that is, specifically, what is commonly called the trial of a "land damage case."

Before undertaking the preparation of a land dam-

age case, the attorney and his client should seriously consider whether the game is worth the candle. Land damage cases are expensive to prepare and try properly, and if the land taken is not really valuable, or the damage is not severe, or the margin between the award or offer made by the condemning party and what the owner claims is not great, it is the wiser course, and more to his client's advantage, for the attorney to make the best settlement possible rather than to allow his client to incur the expense of trial, with the result, even if successful, of receiving no greater net compensation than if he had accepted what was offered him in the first place, and having the annoyance and mental strain of a trial for nothing, not to mention the risk of failing to better the award. The corporation which made the taking can often afford to try a land damage case when very little is involved, for the moral effect it will have upon the owners of other lands; but an owner should beware of being the representative of his neighborhood in a test case. If the other owners are to get the benefit of a successful outcome in the shape of favorable settlements they should share the expense of the trial. The expense of trying a land damage case, in addition to counsel fees, includes the cost of surveying and making plans, of taking photographs, of the view of the jury, and principally, of the fees of expert witnesses. Real estate experts usually charge fifty dollars a day for services in court, with often something additional for their report. The minimum expense of a land damage case, outside of counsel fees, is $150, and rarely is less than $250.

If a fair settlement cannot be reached, and it is decided to try the case, it should be given a thorough preparation. The attorney, if not already familiar with the locality, should first of all examine the property and its surroundings with great care, so as to be able to appreciate its possibilities and to understand the testimony in regard to it. He should employ a competent surveyor to make a plan showing clearly the original parcel and the land taken. He should then undertake the most important step, the engaging of competent expert witnesses.

The first question, which arises in all land damage cases, is the value of the land before the taking. Value is a matter of opinion, and may be shown by evidence of the opinion of experts and of other witnesses who have special knowledge of the subject. The customary experts are dealers in real estate. Dealing in real estate is an honorable occupation, and the number of real estate men who deservedly enjoy the confidence of the community is doubtless very large; but unfortunately the occupation of dealing in real estate is too frequently the last refuge of a scoundrel, and there are always plenty of worthless fellows who call themselves real estate men and who insinuatingly proffer their services to litigants in land damage cases. Such men will testify gladly for whichever party is willing to pay them the usual fee, and the land is ruined or doubled in value in their estimation, as best suits the interests of their employer. Such men should be avoided as the plague. They are sure to be known by reputation to someone on the jury, and the presence of one such man among

the forces of one of the litigants may breed a wholly unmerited distrust of the justice of his case in the minds of the jury. The principal witness for the owner should be a real estate dealer of standing in the community, who not only has a substantial knowledge of the subject of real estate values as a whole, but who has dealt in lands in the neighborhood of the land in controversy at or about the time of the taking. Such a dealer should be retained by the attorney and asked to prepare a written report, estimating the value of the original tract and the value of the land taken, if any, and the damage to the remaining land, treated from the owner's point of view. If the report is in accord with the owner's contentions, he is one step further in the preparation of his case. If the report of the expert is unfavorable, and he cannot be convinced of the merit of the owner's claim, there is nothing to do but to pay his bill and try someone else. If another competent expert, who is not in any way tied up with the corporation taking the land, is also of opinion that the award is sufficient, the owner and his attorney should again seriously consider the advisability of settlement.

Assuming, however, that the first expert's report is encouraging, the attorney should proceed in a similar way to secure as many more experts as the importance of the case will warrant. Few cases are of sufficient importance to be tried at all, if they must be tried with less than two experts. If dealers in real estate are not available, or even if they are, to supplement their testimony, it is well to secure opinion evidence from other sources. Local officials,

such as assessors of taxes, often have a good knowledge of land values in the districts in which their duties require them to officiate, and are available as witnesses to value in cases in which the city or town by which they are employed is not a party; and even in cases of the latter character former officials can sometimes be used. Shrewd men of mature age who have dwelt in the vicinity of the land for many years and are familiar with its possibilities and with the prices that have been paid for land in the neighborhood are competent witnesses, and often very effective with the jury, some members of which may have an innate distrust of real estate men and politicians.

The attorney should go over the case thoroughly with all his witnesses and cross-examine them himself, so that all possible weaknesses in their testimony will be brought out and guarded against, and he should not allow them to express any opinions that they cannot back up with facts or sound and plausible reasoning.

He must familiarize himself with all sales of similar property in the neighborhood, at or about the time of the taking. The price paid at such sales is admissible in most jurisdictions as direct evidence of value, and can be used on cross-examination everywhere. The sales, to be admissible in evidence, must be voluntary; evidence of the price paid in condemnation proceedings or at foreclosure sales is not admissible. There is no more conclusive evidence of value than the price paid for really similar land at a bona fide and voluntary sale, especially if it can be shown that the prices in several sales were con-

sistent with each other and established a recognized market price of a definite sum per acre or square foot. Such evidence is worth more than the unsubstantiated opinions of a dozen experts. If the conclusion to be drawn from the evidence of sales is unfavorable, the attorney must be prepared to distinguish the cases or explain away the conclusion, or he may be sure that his opponent will introduce such evidence with telling results.

Another class of evidence to prepare, both as a separate subject matter and as incident to the testimony of the experts, is evidence relating to the possible uses of the land. The test of value in land damage cases is not value to the owner, or value for the use for which the land is actually put, but the fair market value of the land, that is, the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy, taking into consideration all uses for which the land is adaptable and might be used which are so reasonably probable as to have an effect upon present value. Therefore it is proper, when residential property is taken by eminent domain, if such property has a greater value for business purposes, to put in evidence facts tending to show such value, as for example the nearness of the premises to the business centre of the town, the amount of traffic on the street upon which it fronts, the use to which neighboring property is put, and such special circumstances as, for example, nearness to a post-office, or to a railroad station, or to a factory in which many hands are employed. If it is contended that the property is valu-

able for manufacturing purposes, the shipping facilities, and the possibility of connecting the premises with a railroad by means of a spur track, may be shown. In the case of the taking of a large tract of land in the suburbs of a growing city, whether the land is vacant or is used for farming purposes, if it has a value for residential purposes, the attorney should have a plan prepared showing how the land can best be developed for such purposes, with projected streets and house lots marked out. Such a plan, with explanatory evidence, is admissible as showing one of the possible uses of the land, and consequently its market value as it stands; the price at which the separate lots will sell is too remote, as it may be many years before all will be sold; and attorneys should be very careful not to go too far with this sort of evidence. If there is no reasonable probability that there will be any demand for house lots in the neighborhood for many years, to offer a plan showing a division into streets and house lots will merely bring ridicule upon the owner, and raise a suspicion in the minds of the jury that his whole claim is a fraud.

It is sometimes proper to consider, among the possible uses of land, the public use for which it is actually taken. Land may be so situated with relation to a large city or town and its most available water supply that such land will probably or inevitably be required, in the course of the natural growth of population, in connection with a system of water-works. If this probability enters into the present market value of the land, it may be taken into consideration,

but it should be remembered that when the use for which the land is likely to be needed is one for which property may be taken by eminent domain, the natural monopoly which its situation gives it does not enhance its market value as much as would its character as an especially desirable site for private business purposes, as in the latter case the owner cannot be compelled to part with it except at his own figures.

An attorney should also look into the question whether the value of the land has not been increased by the expected construction of the improvement for which it was taken. Of course, if it was known from the first what land was to be taken, the land taken derived no increase in value from the expectation of a public improvement in its neighborhood, proximity to which it could never enjoy. The hope of a successful lawsuit is not a valuable use of land. It often happens, however, that, long before the construction of a particular public improvement is authorized, and its site definitely located, it is discussed and projected, and values in the whole of the neighborhood in which it is planned to construct it rise in anticipation. In such a case, when the taking is finally made, the owner is entitled to recover the market value at the time of the taking, and to enjoy the benefit of the increase in values due to the expectation of the coming of the improvement.

In some land damage cases the land involved is of such a character, or is put to such a use, that it has no value for sale in the ordinary manner, or its value cannot be proved by persons familiar with the market value of adjacent property, and yet it fulfils the

purposes for which it is held, and has a real value to the owner. In this class would fall such properties as a church or a cemetery, or even a site occupied by a mill which was the only one of its kind in the part of the State in which it was located. In such cases, as real estate experts of the usual character would be unable to testify with any degree of assurance as to market value, value may be proved by witnesses familiar with the property itself and the use to which it is applied, who may testify as to its value for such use.

Ordinarily, when land is taken by eminent domain, although the public acquires only an easement, and the title to the land subject to the easement remains in the former owner, as a practical matter in awarding compensation no distinction is made from a taking of the fee, and the owner is awarded the full market value of the land subjected to the easement. In some cases, however, the easement is of such a character that the enjoyment of the fee has a substantial value, as when the easement of stringing telegraph wires over private land is taken, or of laying pipes beneath the surface. In such cases a real estate expert who could merely testify as to the value per square foot of the strip of land included in the taking would be incompetent, and it would be necessary to engage witnesses who would be able to qualify from their own experience as competent to express an opinion upon the amount of damage that the imposition of the easement would inflict upon the land by making it less available for use.

If there are buildings upon land taken by eminent

domain still another class of evidence is required. Buildings are not to be valued apart from the land, but are considered only so far as they add to the market value of the land. A building inappropriate to its surroundings may actually detract, to the extent of the cost of tearing it down, from the value of the land. To lay a foundation for testimony upon the value of buildings the evidence of a real estate expert that the buildings are suitable and appropriate for the uses to which the property is best adapted is essential. If this can be shown, then it is a fair conclusion that the buildings increase the market value of the land to the extent of their own structural value. Structural value should be shown by carpenters and builders who have given the building a thorough examination and are able to testify as to the cost of reproduction. Such cost, with a reasonable allowance for depreciation, represents the structural value in ordinary cases. It sometimes happens, however, in large cities that an old building is taken for widening or extending a street or for other public uses, which is well tenanted and returns a large income to its owner, but which could not be lawfully reproduced on account of the enactment of more stringent building laws since it was erected. In such a case an artificial value is created, and the market value of the land and building may be greatly in excess of the market value of the land alone plus the structural value of the building. If the premises are taken by eminent domain the owner is entitled to be paid the full market value, even though part of such value is based upon the exercise of the police power of the State.

If the premises taken are rented, the gross amount of rents received is admissible on the question of value. The assessed value, or the amount for which the premises are taxed, is not admissible in evidence, even in States in which real estate is assessed its full market value, except in States which by statute allow the admission of such evidence. Some attorneys, however, manage to get the assessment before the jury by calling one of the assessors as an expert. If he states his opinion of the value of the property to the jury and is not cross-examined upon the inconsistency of his testimony with his officials acts, it is a fair inference that the assessment was substantially the same as his opinion of the value.

After sufficient evidence of the value of the original tract has been obtained, the next question upon which to prepare for trial is, how much has it been damaged by the taking. Of course if the entire tract has been taken, the measure of damages is the value of the land. If part of the tract has been taken, it is the usual practice to figure the market value of the land taken and add to it the damage, if any, to the remaining land. Upon these issues the same witnesses whose opinions were sought as to the value of the original tract may be used. It often happens, however, that the damage to the remaining land can be entirely or partially corrected by adapting the land to its new surroundings, as by filling or cutting down the land to correspond with the new grade of a street, or by erecting a retaining wall or putting a new front or a new entrance upon a building. If the cost of such work will be less than the depre-

ciation in the value of the land if it is left in its former condition, such cost represents the proper measure of damages; but to lay a foundation for evidence of such cost it is necessary to offer testimony of experts upon valuation, to show the amount of depreciation if no work is done, unless it is apparent on the face of things that the cost of repairs will be less than the damage if the property is allowed to stand as it is. The foundation having been laid by real estate experts, the cost of the alterations can be shown by civil engineers, architects, contractors, builders, masons or whoever may be best qualified to testify as to the cost of the particular repairs required under the circumstances.

If possession is to be taken of the property before the trial and its physical appearance altered by the construction of public works upon it, as is permitted in many of the states, the attorney should have photographs taken by a competent professional photographer showing the land and buildings as they were before the taking.

The preparation having been completed, the attorney is now ready to proceed with the trial of the case. In jurisdictions in which a jury is required, the case takes its place upon the court calendar and is tried by a judge and jury in the same manner as other lawsuits. When a city or town is a party, taxpayers in such city or town may be challenged for cause. When the trial is before commissioners, it should proceed with all the formality of a lawsuit, and no evidence should be presented to the commissioners except under oath and in open court. The

rules of law relating to admissibility of evidence in proceedings in court should in substance be followed.

After the jury has been impanelled or other tribunal is ready for the hearing, a view of the premises should be taken. A view is required by law in many states in land damage cases if either party requests it, and should be had in the interest of justice in every instance, as no tribunal can intelligently hear a land damage case without having seen the premises. The owner naturally desires to have his property show to best advantage, and sometimes a little manoeuvering occurs, especially when the property involved is in the suburbs, the owner endeavoring to have a trial in the late spring when the surroundings are attractive, while if the parties making the taking succeed in having the trial take place in winter, and oblige the jury to wade through slush and snow to view the premises, they feel that they have scored a distinct advantage. The function of a view is not the same in all the states. In some states a view is had merely to enable the jury to understand and apply the evidence, and the verdict is based on the evidence only, while in others the jury is expected to use its own knowledge of values in connection with what it sees on the view, and to return a verdict based upon both the view and the evidence. If a view is taken of land alleged to be damaged by the operation of a public improvement, such as an elevated railroad, the attorney for the owner should find out the usual running time of the trains between two points on either side of the land

in controversy and make sure that the trains are being operated in their customary manner while the jury is taking its view; otherwise the jury may be misled as to the amount of damage.

After the jury has returned from the view, it is not unusual to have hung up in front of the jury a large plan which both parties agree is correct, showing the original property and the limits of the taking, colored appropriately, so that the witnesses can explain their testimony by reference to the plan. The award of the commissioners is not admitted in evidence or in any way brought to the attention of the jurors, and the burden is upon the owner to show the value of his property and the extent of his damage. When the owner is petitioner or plaintiff, he has the right to open and close as a matter of course, and even in those states in which the condemning party is petitioner and the owner respondent, the latter usually has the right to open and close. In some states, however, the petitioner although it is the party seeking to take the land, has the privilege of opening and closing.

If the owner has the right to open, it is usual, after the proceedings have been read or put in evidence so that it appears what has been taken or is sought to be taken, and the owner's title proved, if he is the petitioner, by a certified copy from the registry of deeds of the conveyance under which he holds, for the owner himself to take the witness stand and to state what, in his opinion, his property was worth before and after the taking. The owner is competent to testify as to value, merely by reason

of his ownership, without any other qualification as an expert. The presence of the owner on the stand is of great importance to his case, as injecting into it the human element, for the jury is apt to give little weight to a claim for damage, unless the person most interested is willing to meet them face to face and tell them why he thinks he has been injured and how much. On the other hand, the examination of the owner is the crucial point of the case, and, if he fails to make a favorable impression, his attorney has thereafter an uphill battle. The owner must be cautioned not to "lay it on too thick," for while a certain amount of exaggeration of both value and damage will be attributed to the natural impulses of an interested party, and not harm him seriously in the minds of the jury, the writer has many times seen a man of honesty in his daily life, with a genuine claim for substantial damages, so carried away by his love of easily gotten money and his sense of resentment at the taking of his property without his consent, as to make a preposterous estimate of his own damages, with the result that the jury has set him down as a liar and a crook, and denied him even the reasonable compensation to which he was justly entitled. Then, again, it does not look well for the owner to estimate his damages far in excess of his own experts, or to make a claim on the witness stand inconsistent with his own previous statements. An owner who has testified to the value of his own land is badly discredited if it is brought out on cross-examination that he has offered the same land for sale at a price far below what he now testifies is

its fair market value, and has been unable to secure a purchaser. Owners too often make fools of themselves on the witness stand and do their case more harm than good, but unless an attorney knows by experience that his client is hopeless as a witness, it is taking an even greater risk to go to trial without him.

An owner may testify as to the physical characteristics of his land and the amount of rent received therefrom. If the land is used for farming, he may tell the jury what crops it produces. Owners whose property was used by them in their business are very likely to want to talk at length to the jury about the injury to their business by being compelled to move, or to rebuild their stores if part of the building was taken. This evidence is not admissible, as injury to business is not a proper element in awarding compensation for land taken by eminent domain. The amount of business done on the land before the taking may, however, be shown, not as an element of damage, but as bearing upon the availability of the land for the use to which it is actually being put. The attorney should explain this distinction to his client before the trial, as otherwise the owner may insist on attempting to get the evidence before the jury in his own way, and thus cause it all to be excluded.

Similarly, what the owner intended to do with the premises is not admissible, and evidence of the owner's plans can be introduced only as showing one of the possible advantageous uses of the land. This distinction should also be explained to the owner

before he takes the stand, if he has any story of blighted projects that he wishes the jury to hear. The owner should also be warned to take his cross-examination calmly and without losing his temper, and, if he is asked any question the answer to which will be harmful to his case, to reply at once in a matter-of-fact way. The evidence is indefinitely more harmful if it is dragged out of him after a long series of reluctant and evasive answers.

After the owner has completed his testimony the principal real estate expert is called. A competent and experienced real estate expert needs little help from the lawyer. He should first be asked his name, his occupation, the length of time he has been in the business and the extent of his business, his membership in real estate exchanges and the like, and his other qualifications in respect to the real estate business and especially this branch of it, such as acting as appraiser in other land damage cases, thereby showing that other persons had confidence in his integrity and judgment of values, and testifying as expert for the condemning party in other cases, thereby showing that he is not temperamentally optimistic upon the subject of land values. His general qualifications having been shown, he should be examined as to the sales he has made in the immediate vicinity of the land in controversy, the lots sold by him being pointed out on the map as his testimony proceeds. At this point he is not asked the price paid at the sales in question, but merely the fact that he knows the price. After the sales are enumerated, he may be asked similar questions in regard to lands

he has leased, or held for sale, or dealt with in any other way. After the attorney for the owner has brought out all the qualifications of the witness, it is customary in most jurisdictions for the attorney for the condemnor, if he does not admit that the witness is qualified, to cross-examine him on that point before the witness attempts to testify as to value, and at the close of this cross-examination the court rules as to his qualifications. Whether an expert is sufficiently qualified is almost entirely in the discretion of the judge presiding at the trial, and no exception lies to his ruling unless it is palpably wrong. If the witness is held to be qualified, the attorney for the owner asks him if he has examined the property in question, and upon receiving an affirmative answer asks him how much, in his opinion, it was worth immediately before the taking or injury complained of, or on whatever day is fixed by the local practice as the date as of when damages are assessed. Upon a figure being named, the expert is next asked his reasons, and should then, with as little prompting from the attorney as possible, state the uses for which the land is available and all the other elements of value. At this point, if evidence of sales is competent in the jurisdiction in which the trial is taking place, the expert may be asked the price paid at or about the time of the taking for similar lands in the neighborhood.

Evidence of the value of the land before the taking having been introduced, the next step is to show the amount of the damage. In some jurisdictions it is held that an expert cannot be asked to state the

amount of the damage, as that is a matter of conclusion for the jury to pass upon, but he may be asked the value before and the value after the taking. After such testimony the jury can readily ascertain what the expert considers to be the damage by subtracting one figure from the other. In other states an expert is allowed to give his opinion of the amount of damage to the jury directly. An expert may either state the damage in dollars and cents, or testify that the property has lost a certain percentage of its value. The expert should state some plausible reasons for his estimate of damage, as a dogged insistence that the property is damaged a certain amount without anything to back it up makes a bad impression. Evidence that property similarly affected sold for less than before the taking is of course the strongest corroboration of the expert's opinion, and instances of sales of this character should be carefully sought out and put in evidence at this point. The amount paid in settlement for the injury to neighboring lands cannot, however, be put in evidence in any form.

The right of the condemning party to set off benefits to the remaining land, resulting from the construction of the public work for which the land was taken, from the value of the land taken or from the damages to the remaining land, depends upon the constitution and decisions of the state in which the trial is taking place, and as there are at least six different rules upon the subject adopted by the different states, it is impossible to go into this phase of a land damage case in an article like the present.

It may be said, however, that in a state in which benefits may be set off, the existence and amount of benefits should be proved by the same sort of evidence as damages, and that absence of benefits is part of the owner's case in chief. In other words, it is incumbent upon the owner to show how much less his property is worth by reason of the taking, considering all elements both of advantage and disadvantage resulting from the taking, and he cannot offer evidence of the absence of benefits for the first time in rebuttal.

After the principal expert has testified, other experts are introduced in the same manner. While it is well to allow the experts to consult with each other before the trial, each should make his report to the attorney for the owner independently of the others. After the report has been made, an expert may well revise his judgment, if he finds it at variance with those of men whose opinion he respects, but he should not be expected to give testimony which he does not himself believe. If his opinion is widely divergent from that of his fellows he should not be put on the stand. On the other hand, it does not look well for all the experts of one of the parties to testify as to exactly the same amount of value and damage, as it shows conclusively that they have concocted their testimony together and that it does not represent the independent judgment of any one of them.

When the condemning party begins to put in its case, the attorney for the owner should remember that, in most jurisdictions, he has the right to cross-

examine an expert upon his qualifications, before he begins to testify as to value, and that unless the attorney for the owner cross-examines the expert as to qualification the jury will conclude that he concedes the point. Of course all experienced attorneys avoid cross-examining a witness when the only effect will be to emphasize his testimony on direct examination, but it is a rare case in which a real estate expert cannot be compelled upon cross-examination to modify a sweeping claim to familiarity with the immediate vicinity of the land in question; and often, by pinning him down to sales within his personal knowledge, his testimony is discredited or even excluded altogether.

If the opposing expert is allowed to testify, the attorney who has thoroughly familiarized himself with the rules of evidence in land damage cases has a great advantage over one who is without special experience or preparation in this line, and may often prevent the introduction of much testimony of a damaging character to which an attorney less carefully prepared would fail to object.

It is, however, upon the cross-examination of the experts introduced by the opposing side that an attorney in a land damage case has the greatest opportunity to display his skill, and while ability to cross-examine well is to a certain extent a natural talent, in cases of this character the success of the cross-examination depends largely upon the preparation of the attorney conducting it with relation to the facts of the case. An attorney who has familiarized himself with all the sales in the neighborhood

of the taking, and the circumstances of each sale, and who knows what the different real estate men of the neighborhood have been doing, is frequently able to discredit the entire testimony of a hostile real estate expert by showing that he concealed from the jury material facts with regard to a transaction, concerning which he has testified, which put it in an entirely different light, or by making him admit that the same conditions affected certain other property in a different manner from that in which he testified the property under consideration would be affected.

Upon the closing argument the attorney for the owner could marshal his evidence and the inferences that can be logically drawn from it, rather than indulge in denunciations of the condemning party or appeals to the prejudices of the jury. It is not, however, improper to lay stress upon the fact that eminent domain is a drastic interference with individual property rights, and fraught with possibilities of abuse and injustice, unless the owner is awarded the just compensation guaranteed him by the constitution. In discussing the value of land taken, the attention of the jury should be called to the point that this is the owner's only day in court, and that if his contentions as to the latent value of the land for uses to which it is not now put are disregarded by the jury, but subsequently prove to have been sound, the injustice can never be rectified.

Upon the subject of damage to land not taken there is one point often overlooked by court and counsel, with the result that grave injustice is done

the landowner. It usually happens, when an easement is taken by eminent domain, that it is not planned or expected to exercise the easement taken to its full extent at once, but the damages should nevertheless be assessed upon the basis of the right taken, and not of the plans of the condemning party, which it may subsequently modify at any time. If damages are assessed upon the basis of the actual use to which the land has been put or which it is intended to put it, and the easement taken is afterward enjoyed to its full extent by the condemning party, the owner is never compensated for the additional damage to his land. For example, an owner of land taken for highway purposes is not entitled to additional compensation if the grade of the highway is subsequently changed, or a street railway, and, in some jurisdictions, a telegraph line, or even a steam railroad, is constructed upon it, by authority of laws subsequently enacted, unless the constitution or statutes of the state make special provision for compensation in such cases. If a strip of land is taken for railroad purposes, and devoted to a single track line with but few trains a day, the owner is not entitled to additional compensation if the strip becomes part of a four-track through line, with dozens of fast, heavy trains daily, and grades are changed so that his land is covered with surface water. In all of such cases additional compensation is denied the owner because, in theory of the law, he received compensation for the full exercise of the easement when it was taken. It therefore behooves the attorney for the owner in all cases of this char-

acter, by requests for rulings to the judge and by argument to the jury, to bring out emphatically the full extent of the easement taken, and to make the jury clearly understand that unless the owner is compensated now for the damage arising from the uses to which the land taken may lawfully be subsequently put, he never will be. Similarly, when part of a parcel of land is taken in fee for a park or similar harmless use, if the city has the right to sell the land so taken or to erect buildings upon it without additional compensation to the owner of the remaining land, the attorney for the owner of the remaining land should call the attention of the jury to this element in the compensation to which he is entitled.

From all that has been stated, it will be seen that the trial of land damage cases requires a careful preparation both of law and fact, and it is doubtless easier for an attorney unfamiliar with land damage cases to call in as senior counsel a specialist in such litigation, but an attorney in general practice, who is able and unwilling to put the time into preparation, should not be afraid to try a land damage case without calling in a specialist to assist him, unless the case is of unusual importance or presents unusual difficulties.

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